FILED
OCT 11 1927
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

Number 725

FAIRMONT CREAMERY COMPANY,
Plaintiff in Error,

vs.

THE STATE OF MINNESOTA,
Defendant in Error.

REPLY BRIEF ON MOTION.

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REPLY BRIEF ON MOTION.

This is a criminal case. The opinion and decree of this court did not award costs to plaintiff in error. The clerk entered a judgment for costs assessed at three hundred thirty-three dollars. Such judgment, so far as it included costs, is not authorized by the opinion and decree of the court and is without authority in law.

The motion of defendant in error does not ask the court to modify its opinion or decree, or to grant any relief other than that granted by such

opinion or decree. It asks that the judgment be modified to exclude a matter inserted by the clerk without authority in law and, as defendant in error, believes void.

Most of the cases cited in the brief of plaintiff in error, in opposition to the motion of defendant in error, involved motions or applications asking for relief which went to the merits of the case or involved a modification of the final decree as made by the court thus:

In *Ford v. Potter*, 18 Howard 42, a motion for re-argument was made.

In *Skell v. Dodge*, 107 U. S. 629, the court was asked to change an order of dismissal, with its legal consequences, into an affirmance of the judgment below, with its legal consequences.

In *Reynolds v. Manhattan Trust Company*, 101 Fed. 97, the application was to modify the decree in a mortgage foreclosure proceedings so as to make certain mechanic's lien claims a first lien on the sale proceeds, a bond given for the payment of such claims having been found after the entry of such decree to be worthless.

In *Casey v. Sterling Cider Co.*, 15 Fed. 52, the court was asked to modify its decree of affirmance by adding thereto the words "with interest."

In *Journeman v. East Tennessee Land Co.*, 85 Fed. 251, a petition was made to modify the decree

and mandate so as to award costs in the lower court to complainant.

In *Phillips v. Negley*, 117 U. S. 674, there was involved the power of a court at a subsequent term to set aside and vacate a judgment duly entered and to grant a new trial.

The case of *Brandstreet v. Potter*, 16 Peters, 317, has no application. The court was asked by both parties to a suit to consider and determine certain questions of law not raised by the bill of exceptions, for the sole purpose of assisting the trial court on a retrial of the matter, it being agreed that an order of reversal should be made. The court went no further than to hold that the appellate court would not consider questions of law not properly presented to it by the bill of exceptions.

In *Stanolind Mfg. Co. v. LaRombarde*, 247 Fed. 879, a decree of reversal was entered, the appellants to recover their costs in the appellate court. Costs were taxed by the clerk and the amount thereof duly entered in a judgment. A mandate was issued to the trial court. At a subsequent term complainant petitioned the court to recall the mandate and to modify the judgment by including therein an item for the printing of the transcript of record. At the time the clerk assessed the costs, complainant had not filed a voucher of such item. The judgment was correct so far as the files then existed. There was no unauthorized act on the part of

Office Supreme Court, U. S.
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In the Supreme Court of the United States.

OCTOBER TERM—1927

No. 602

ANTONIO FANTAUZZI,

Petitioner,

vs.

JOSE ESTEBAN GARCIA, a minor, by his mother, JACINTA GARCIA Y TORRENDELL.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

FRANCIS E. NEAGLE,
Attorney for Petitioner,
165 Broadway,
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In the Supreme Court of the United States.

OCTOBER TERM—1927

ANTONIO FANTAUZZI, Petitioner, vs. JOSE ESTEBAN GARCIA, a minor, by his mother, JACINTA GARCIA Y TORRENDELL.	No.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The petitioner above named respectfully shows:

1. This case involves important questions of the local law of Porto Rico which have not been passed upon by the Supreme Court of Porto Rico and which have been decided by the Circuit Court of Appeals for the First Circuit in a way in conflict with analogous local decisions. It also involves an important question of general law which has never been decided except by the Circuit Court of Appeals for the First Circuit in this particular case. No similar case has been found by

the attorney for the petitioner or by the attorney for the respondents. As the law of Porto Rico is for all purposes Federal law, the case involves important Federal questions which have not been and should be decided by this Court.

2. The matters involved are important in the development of the law of Porto Rico where the percentage of illegitimate children, most of whom are unacknowledged, is very large.

A. One question is whether a natural child who has not been legitimated by his putative father may sue in *tort* for damages for such failure to recognize.

B. There is involved also the question whether the provisions of the Civil Code of Porto Rico compelling the father of a natural child to make a monthly allowance for his support after demand therefor is exclusive of any other right of the natural child against his alleged father.

C. Another question is whether a child born out of wedlock, who has been legitimated by a man in due form of law, may disregard that legitimation, *and the status thereby conferred*, and sue another, whom he alleges to be his father, for damages for failure to legitimate him.

D. Still another question is whether under the law of Porto Rico, as interpreted by the Circuit Court of Appeals for the First Circuit, an illegitimate child can have two fathers by operation of law; one by voluntary legitimation in due form of law, and the other by reason of a judgment for damages for failure to legitimate, which judgment by operation of law compels the judgment debtor to legitimate the child.

3. The question of the right of an illegitimate child to sue its alleged father *in tort* for failure to legitimate him has never arisen in any case other than the case at bar so far as diligent search can discover. Counsel for the illegitimate child so stated in his brief in the Circuit Court of Appeals and also stated that the staff of one of the large law publishing houses was unable to find such a case. Counsel for the petitioner after exhaustive investigation has failed to turn up such a case.

4. In Porto Rico there is a very high percentage of illegitimate children, most of whom are unacknowledged. There have been many suits for filiation,—unsuccessful because of the strict rules applied. The case at bar is an attempt to avoid these strict rules by an action for damages before a sympathetic or prejudiced jury, the necessary result of success in which is a finding of parentage which carries with it by operation of law legitimation and the right of inheritance.

5. The issue is upon complaint and demurrer.

Denominating the suit as "a cause of action for damages", the complaint alleges that the plaintiff, José Esteban Garcia, is seventeen years of age and the natural son of Jacinta Garcia y Torrendell, who is alleged to be the plaintiff's guardian (R., 3).

Jacinta Garcia and the petitioner are alleged to have lived "together as man and wife live together" for *several months* during the year 1906, and *during* this cohabitation Jacinta Garcia gave birth to the plaintiff (R., 3). It is not alleged that Jacinta Garcia and the petitioner lived together *as man and wife* or in concubinage. The natural meaning of the words is that they had sexual intercourse.

Petitioner is alleged to have been at the time, and to be now, a man of ability, intelligence, education and wealth, of high social position in Porto Rico and in France, and to be worth about three million dollars. He is alleged since plaintiff's birth to have married and to be the father of three children who reside with him in France (R., 4). It is then alleged in the complaint that by reason of the facts above stated plaintiff is a legal heir of petitioner and that the value of plaintiff's interest in petitioner's property is not less than one-half million dollars (R., 4).

Plaintiff alleges that on many occasions he and his mother asked the petitioner to acknowledge plaintiff as his natural son publicly and in the manner provided by law, but that while privately admitting paternity petitioner has always refused to make public acknowledgment, and by thus doing has deprived the plaintiff of the right to bear petitioner's name and to inherit his share of petitioner's property.

Plaintiff further alleged that as petitioner's son he was entitled to be reared, supported and educated in a manner befitting the son of petitioner, and that as a consequence of petitioner's refusal to recognize the plaintiff as his son, plaintiff has been reared in poverty, his education has been neglected, and he has been forced to live under sordid and immoral conditions greatly to his humiliation, prejudice and damage (R., 4).

Plaintiff further claimed that petitioner in addition to failing to recognize him as his son conspired on or about February 9, 1910, with parties unknown, to induce, and did induce, the plaintiff's mother, Jacinta Garcia y Torrendell, and one José Dolores Diaz y Aponte, a colored barber, without education, means or social standing, but of immoral and vicious life and habits, to appear together before a notary public and falsely state in writing in a public document that José

Dolores Diaz y Aponte was the father of plaintiff. Plaintiff alleges upon information and belief that petitioner or his agents represented to the plaintiff's mother and to José Dolores Diaz y Aponte that the effect of the public document was that by it the said Diaz was only adopting plaintiff as his son (R., 5).

Plaintiff alleges that the petitioner further conspired to cheat him of his right to bear petitioner's name and of his inheritance by causing Diaz on April 12, 1920, with money furnished by the petitioner, to establish a trust fund with the National Park Bank of New York City, the income of which was paid to the said José Dolores Diaz y Aponte for plaintiff's benefit. It is alleged that petitioner paid José Dolores Diaz y Aponte $3,000 to induce him to establish the trust fund, and upon information and belief that the income from the trust fund has been paid to Diaz y Aponte as plaintiff's father, from which plaintiff has received no appreciable benefit (R., 5).

It is alleged that plaintiff and plaintiff's mother and the said Diaz y Aponte learned that the document signed by the parents on February 9, 1910, was not an adoption but was a legitimation of plaintiff by the said Diaz, and that, therefore, plaintiff's mother and Diaz again appeared before a notary public on April 13, 1925, and by another public document revoked the document of February 9, 1910, as being untrue and as having been signed under a misapprehension of its contents and meaning, due to the false representations of the petitioner and those acting for him (R., 6).

Plaintiff, it is alleged, after the date of the instrument of revocation went with his mother and demanded of petitioner that he acknowledge him as his son, which petitioner refused to do, and refused to make any provision for the support and education of the plaintiff (R., 6).

Plaintiff alleged also that the defendant failed and refused to support and educate him and that since April 13, 1925, petitioner has refused to make any provision for the future support and education of the plaintiff. It is alleged by plaintiff that a fair and equitable provision for his support and education as petitioner's son from plaintiff's birth until he reaches the age of twenty-one years would be the sum of $1,000 per annum (R., 6).

Plaintiff further alleges that after his legitimation by José Dolores Diaz y Aponte by the notarial document of February 9, 1910, he was taken, at petitioner's instigation, by Diaz y Aponte and forced to live with him for many years in poverty and in sordid and immoral conditions; that his training and education were neglected; and that plaintiff has received damages from which he can never recover (R., 6).

Because of that set out above plaintiff alleged that he was damaged in the sum of $100,000, and in addition he alleged that because of petitioner's conspiracy to defeat plaintiff in his right to use petitioner's name and to cheat him out of his prospective inheritance, and because petitioner by a wicked and criminal conspiracy made it appear that the plaintiff was the son of an uneducated colored barber of no means or standing and of immoral life and habits, petitioner laid himself liable to exemplary damages in the sum of $150,000. The prayer of the complaint, therefore, is for judgment against the petitioner for the sum of $250,000 (R., 7).

It is interesting to note that in paragraph 1 of the complaint it is alleged that the plaintiff is seventeen years old (R., 3); in paragraph 12 it is alleged that on February 9, 1910, plaintiff was four years of age (R., 6). If plaintiff was four years of age on February 9, 1910, he was nineteen years of age on February 9, 1925, and must, therefore, have been born on or before February 9, 1906. Paragraph 2 of the complaint, however, alleges

that the cohabiting of Jacinta Garcia and the petitioner was "for several months during the year of 1906", and that during it Jacinta Garcia gave birth to the plaintiff (R., 3). Evidently the plaintiff was born prior to the intercourse between Jacinta Garcia and the defendant for surely the mother who verified the complaint knew when her offspring was born, though the father may not have so known.

6. The petitioner demurred to the complaint on a large number of grounds (R., 8-11). The demurrer came on for argument before the Judge of the District Court of the United States for Porto Rico and on August 17, 1925, was sustained "on all the grounds and for all the reasons mentioned in said demurrer". As a result of this decision the complaint was dismissed (R., 11-13).

7. The Circuit Court of Appeals for the First Circuit reversed the decision below holding that the case stated was not for filiation or for present or future support or to be declared an heir, but that it was a suit to recover damages based on petitioner's "fraudulent avoidance of his statutory duty to support and educate by conspiring with others to cause the plaintiff's paternity to be ascribed to the negro barber" (R., 32).

It grounded its decision on Section 1803 of the Civil Code of Porto Rico (Revised Statutes and Codes of Porto Rico, 1911, p. 801) which says that

> "A person who by any act or omission causes damage to another when there is fault or negligence shall be obliged to repair the damage so done."

It said that

> "The gravamen of the case is that plaintiff is entitled to damages because of the defendant's

fraud in preventing him from asserting the truth as to his paternity, and thus having the environment and education to which his paternity entitled him, and as a part of the wrong and as a means of effecting it, conspiring with others to cause the boy's paternity to be ascribed to the negro barber." (R., 32.)

Judge Johnson dissented.

8. The Supreme Court of Porto Rico has held that legitimation confers a *status* upon a child which carries with it certain well defined rights and that this status can only be changed or affected by a suit brought by an interested party, who may be the child, his mother, or the legitimating father, to set aside the legitimation. The Circuit Court of Appeals, without discussion, overrules this elementary principle and holds that the legitimated child by mere allegation of fraud may disregard his status as a legitimated child and sue another whom he alleges to be his father for damages for failing to legitimate him. A necessary outcome of a judgment in favor of the child is a judicial determination of parentage without in any way affecting the original legitimating father who is not a party to the action. The net result is that after judgment for the plaintiff he will have two fathers, not by the law of nature, but by the operation of man-applied law. Under the law of Porto Rico he will be entitled to support from both of them. Conversely they will both be entitled to support from him. He will share in their property after death and they will share in his property. A decision of this Court is necessary to prevent such an absurd result.

9. There is presented herewith as part of this petition a certified transcript of the record of the above entitled case in the Circuit Court of Appeals.

WHEREFORE, petitioner respectfully prays for the allowance of a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit to the end that this cause may be certified to this Court for determination by it as provided in Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

FRANCIS E. NEAGLE,
Attorney for Petitioner.

I hereby certify that I have examined the foregoing petition; that in my opinion it is well founded and entitled to the favorable consideration of the Court; and that it is not filed for the purpose of delay.

FRANCIS E. NEAGLE.

BRIEF IN SUPPORT OF THE FOREGOING PETITION.

The opinion of the court below is reported in 20 Fed. (2nd) 524. It is printed at R., 27. The opinion of the court below on reconsideration is not yet reported. It is printed at R., 61. The opinion of the District Court is not reported. It is printed at R., 11.

Jurisdiction.

(1) The judgment to be reviewed was rendered on June 20, 1927 (R., 63). A petition for rehearing was filed on July 18, 1927, and denied on September 7, 1927 (R., 63).

(2) The District Court had jurisdiction under Section 41 of the Jones Act (39 Statutes at Large 985) because of diversity of citizenship and because the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.

(3) The judgment of the District Court was final and the United States Circuit Court of Appeals for the First Circuit was authorized to entertain appropriate appellate proceedings therefrom (Judicial Code, Sections 116, 128).

(4) Jurisdiction in this Court is provided for by Section 240 (a) of the Judicial Code. This petition for review is filed within the three months' period prescribed by Section 8 (a) of the Act of February 13, 1925 (43 Statutes at Large 940).

Statement of Facts.

The facts involved have been fully set forth in the petition which contains a summary of the essential allegations of the complaint.

ARGUMENT.

A.

A natural child cannot sue his putative father for damages for failure to recognize him.

To our knowledge this is the first and only case in the civil or common law where an illegitimate child has sued his putative father for damages for failure to recognize or legitimate him.

We have been unable to discover such a case in the civil or in the common law. We have been unable to find any discussion of the subject by any commentator on the civil law or by any text writer on the common law. In the court below counsel for the minor plaintiff stated in his brief that he had been unable to find a case and that the staff of one of the large law publishing houses had been unable to find any authority on the point.

At common law a putative father is under no obligation to support his illegitimate child (*Schouler on Marriage, Divorce, etc.*, Sixth Edition, p. 743; 7 Corpus Juris 955; *Commonwealth* v. *Dorues*, 239 Mass. 592 at 594; *Beaver* v. *State*, 96 Texas Criminal Reports 179; *Meyers* v. *Harrington*, 70 California Appeals 680; *People ex rel Board of Police* v. *Shulman*, 8 App. Div. (N. Y.) 514; *Grillo* v. *Sherman-Stalter Co.*, 195 App.

Div. (N. Y.) 362, 365, affirmed 231 N. Y. 621; *Marlett* v. *Wilson's Executor*, 30 Indiana 240; *Ex parte Newsome*, 212 Alabama 168; *People* v. *Mitchell*, 44 Barbour (N. Y.) 245; *Moncrief* v. *Ely*, 19 Wendell, (N. Y.) 405).

There is no obligation at the common law on the part of the father of an illegitimate child to legitimate.

The law of Porto Rico expressly provides the instances in which the father of a child born out of wedlock can be compelled to recognize him. Under the Civil Code of 1902, which was in existence when the minor plaintiff was born, no difference was made between illegitimate children and natural children, and a father was obliged to recognize a child born out of wedlock, according to Section 189 of the Civil Code (Revised Statutes and Codes of Porto Rico, 1902, p. 819) when there existed an authentic statement in writing by him expressly recognizing paternity, or when publicly or privately the father had shown it to be his child, or had called it such in conversation, or looked after its education and maintenance, or when the mother was known to have lived in concubinage with the father during the pregnancy or birth of the child, or when the child was born while his parents were engaged to be married, or, as the Spanish puts it, were in *relaciones amorosas*.

Under the Civil Code as amended in 1911 only natural children could be legitimated. Adulterine children could not be legitimated. By Section 193 of the Civil Code as amended in 1911 (Revised Statutes and Codes of Porto Rico, 1911, p. 613) a father was obliged to recognize a natural child when there existed a indubitable statement in writing wherein he expressly acknowledged paternity or where the child had uninterruptedly enjoyed the condition of a natural child justified by acts of the father or of his family, or when the mother was known to have lived in concubinage with the father both during her pregnancy and at the time

of the birth of the child, or when the child could present any authentic evidence of his parentage.

Under the law as amended in 1911 and under the Spanish Code if the recognition of the minor was not made at the time of recording the birth or in the will of the father, the approval of the judge of the District Court of the district where the child resided with the concurrence of the district attorney was necessary. This requirement, however, was not in force from 1902 to 1911.

It is apparent, therefore, that under the civil law the father of a child born out of wedlock was not bound to recognize him under all circumstances but only when the conditions specified in the Code were found to exist. As the Supreme Court of Porto Rico has held that where any of the requirements of the statute could be proven legitimation could be forced by suit, it follows logically that if those requirements were not present filiation could not be compelled, and it also follows that an action for damages would not lie for failure to legitimate where the circumstances required by the Code to exist were found or were not found.

The Civil Code gave to the child born out of wedlock certain specific rights as to acknowledgment and legitimation. On the doctrine of *expressio unius est exclusio alterius* the child's remedies in that regard were only those fixed by the statute.

The Circuit Court of Appeals grounds its ruling upon Section 1803 of the Civil Code (Revised Statutes and Codes of Porto Rico, 1911, p. 801) which says that

> "A person who by an act or omission causes damage to another when there is fault or negligence shall be obliged to repair the damage so done."

The Circuit Court of Appeals say that

"The gravamen of the case is that plaintiff is entitled to damages because of the defendant's fraud in preventing him from asserting the truth as to his paternity, and thus having the environment and education to which his paternity entitled him, and as a part of the wrong and as a means of effecting it, conspiring with others to cause the boy's paternity to be ascribed to the negro barber." (R., 32.)

Plaintiff was never prevented from asserting the truth as to his paternity. He claims to be doing it in this action by his mother and he could have asserted his paternity through her as well the day after he was born as he can now. If there was fraud in the acknowledgment of paternity by Diaz in 1910 the acknowledgment could have been set aside. (*Garcia* v. *Garcia*, 18 P. R. R. 926; *Alcaide* v. *Morales*, 28 P. R. R. 258.)

As the parent of a child born out of wedlock by omitting to recognize and legitimate the child is guilty of no fault or negligence under the scheme of the Code for the treatment of illegitimate children, he is less liable if he conspires to provide for the child a person who does acknowledge him.

Section 1803 requires the person to be held liable to have caused damage. In this case the element of legal damage is entirely absent. If the parent of an illegitimate child has done none of the acts which require him to recognize the child, he has not in the eyes of the civil law damaged the child. If he has done any of the acts which under the Code require him to acknowledge the child, it may compel this acknowledgment, and if it does not, it has suffered no damage. If the parent conspires to cause another to acknowledge his child he has caused no damage for the child can have the acknowledgment set aside.

The situation under the civil law with regard to suits *in tort* by child against parent should be no different than the situation under the common law, and it is well settled at common law that a minor child has no right of action against a parent for the tort of the latter. (*Foley* v. *Foley*, 61 Illinois Appeals 577; *Hewlett* v. *George*, 68 Mississippi 703; *McKelvey* v. *McKelvey*, 111 Tennessee 388; *Roller* v. *Roller*, 37 Washington 242; *Abbott* v. *Abbott*, 67 Maine 304.)

B.

The provisions of the Civil Code of Porto Rico compelling the father of a child born out of wedlock to support him are exclusive.

Under the Civil Code as it existed from 1902 to 1911 no distinction was made, as we have pointed out, between adulterine children and natural children. They were both classed as illegitimate (Sec. 180, *infra*).

The rights of an illegitimate child against the father were for support until the child had arrived at the age of eighteen years, provided that if after the age of eighteen years the child could not work the father was required to continue to support him. This support consisted of a monthly pension in cash paid in advance (Sec. 190, *infra*). The obligation to support could be claimed from the time the person having a right thereto should require it *but it did not begin until the date upon which a petition therefor was made* (Sec. 217, Civil Code, *infra*).

When the Code was amended in 1911 the distinction in the old Spanish Code between adulterine and natural children was revived. Under the amended Code a natural child had the right to be supported (Sec. 195, Civil Code as amended, Revised Statutes and Codes of Porto Rico, 1911, p. 614).

An adulterine child, however, had the right to support only where its paternity was inferred from a final judgment rendered in a criminal or civil action or where the paternity was shown by an indubitable document wherein the filiation was expressly recognized (Secs. 196, 197, Civil Code as amended, Revised Statutes and Codes of Porto Rico, 1911, p. 614).

The definition of this support is found in Section 212 of the Code, reading as follows:

> "Support is understood to be all that is indispensable for maintenance, housing, clothing and medical attention, according to the social position of the family.
>
> Support also includes the education and instruction of the person supported when he is a minor."

Section 213 of the Code specifies who are obligated to support each other within the full meaning of Article 212. They include parents and legitimate children, parents and legitimatized children and parents and illegitimate children.

But the obligation to support provided by Section 213 does not begin for anyone entitled to support until the date upon which a petition therefor is made (Sec. 217).

It follows that if a husband does not support his wife and legitimate descendants they cannot recover moneys expended for support but must petition for support, which will be paid from the date of the petition and will be paid monthly in advance.

Adulterine and natural children have the same right and no greater right. They cannot recover for moneys expended but may obtain a monthly allowance payable in advance from the date when they file a petition therefor. As the Code provides specifically the persons entitled to support, the nature of that support, the manner in which it is obtained, and the way in which the obliga-

tion is fulfilled, it follows that the provisions of the Code as to support are exclusive of any other remedy.

We have been unable to find any case under the civil law where the exclusiveness of this right has been determined. Nor have we been able to find any statements of the commentators dealing with this subject. The absence of cases and the absence of comment seems to us conclusively to support our position.

At the common law, as we have pointed out above, there was no obligation on the putative father of an illegitimate child to support him. In many states under so-called bastardy statutes the overseer of the poor or some similar official is given the authority to bring filiation proceedings in a civil or criminal court against a putative father, and if the defendant is held to be the father of the illegitimate child he is required to support the child by payments made to a public official.

It is uniformly held that where such a statute exists the remedy thereunder is exclusive and the father is under no other obligation either to the child or to the mother.

In *People ex rel Board of Police* v. *Shulman*, 8 App. Div. (N. Y.) 514, at 517, the court said:

> "The proceedings authorized by our statutes are solely for the indemnification of the civil divisions of the State from liability to support bastards * * *. The mother cannot institute a proceeding against the father nor the father against the mother, and in case a proceeding is instituted against either, by any one other than the officials authorized by the statutes, the magistrates acquire no jurisdiction."

The above case was cited with approval in *Grillo* v. *The Sherman-Stalter Co.*, 195 App. Div. (N. Y.) 362, affirmed without opinion 231 N. Y. 621.

In *Marlett* v. *Wilson's Executor*, 30 Indiana 240, at page 241, the court said, referring to the father:

> "His liability would only be for such judgment as might be rendered in a prosecution for bastardy under the statute, and if no such judgment was obtained there would be no liability whatever upon him. The natural obligation of the father to maintain his bastard offspring cannot be enforced as in the case of a legitimate child."

In *Ex parte Newsome*, 212 Alabama 168, the court said, at page 171:

> "This court has frequently held that the father of a bastard is under no legal obligation to support him, and can be forced to do so only in the mode prescribed in the statute for bastardy proceedings."

The present action is said by the Circuit Court of Appeals to be "a suit to recover damages based on defendant's fraudulent avoidance of his statutory duty to support and educate by conspiring with others to cause the plaintiff's paternity to be ascribed to the negro barber" (R., 32).

We submit that the defendant has no statutory duty to support and educate until claim therefore is made by the child and that support not given before the claim is made can never be obtained. Conspiracy on the part of petitioner with anyone to have plaintiff's paternity ascribed to another did not lessen in any way plaintiff's right to support from petitioner. From the moment he filed his petition to set aside the acknowledgment and to have petitioner declared his parent he would be entitled, if he succeeded in showing parentage, to support and that is all the support he could obtain from peti-

tioner if he had not been acknowledged by another man to be his child.

In *Moncrief* v. *Ely*, 19 Wendell (N. Y.) 405, the maternal grandfather of an illegitimate child sued the father for sums laid out in support and maintenance of the child. There had been an order of filiation and support. Judgment went for the defendant on the ground that the liability was entirely statutory and that the order of filiation ordered payments made to the overseers of the poor, and that these officials were the only ones authorized to spend money in support of the child.

Pammell v. *State*, 22 Ohio Appeals 340 and *State* v. *McCurdy*, 116 Maine 359, are to the same effect.

The Civil Code has defined the obligation of the father of an illegitimate child. This obligation confers a right upon the child. It is a right which can be exercised on behalf of the child from the date of his birth. This right is full and complete and exclusive.

C.

The complaint states no cause of action because it shows that plaintiff is the legally acknowledged natural son of Jose Dolores Diaz y Aponte and Jacinta Garcia y Torrendell and no valid revocation of such acknowledgment is pleaded.

In the complaint it is alleged that José Esteban Garcia is the son of Jacinta Garcia y Torrendell and the defendant born out of wedlock (R., 3). It is also alleged (R., 5) that plaintiff's mother, Jacinta Garcia, and José Diaz on February 9, 1910, by a notarial instrument acknowledged the plaintiff as their child, and that later, on April 13, 1925, Jacinta Garcia and José Diaz by a notarial instrument revoked the instrument of acknowledgment of February 9, 1910.

The law regulating the acknowledgment of a natural child is the law in force at the time of the birth of the child (*Morales* v. *Heirs of Cerame*, 30 P. R. R. 784).

The law applicable, therefore, is the law as it existed in 1906 and 1910.

The Civil Code of Porto Rico was enacted in 1902 (Laws of Porto Rico, 1902, p. 751 ff.). The sections of the Code which deal with children and support are Sections 180 to 221 and constitute Titles VII and VIII.

Sections 187 to 197 were amended in 1911 (Laws of Porto Rico, 1911, p. 234 ff.) but those amendments are not applicable here as the minor plaintiff was born and legitimated before they came into force on March 9, 1911.

The pertinent sections of the Civil Code as it existed in 1906 and 1910 are for convenience's sake set out below.

> "Section 180.—Children are legitimate, illegitimate, or legitimatized.
>
> Legitimate children are those born in wedlock.
>
> Illegitimate children are those born out of wedlock.
>
> Illegitimate children may be legitimatized either by the marriage of their parents, or in accordance with the provisions of this Code.
>
> Section 186.—Legitimate children have the right:
>
> 1. To bear the family name of the father and the mother.
>
> 2. To be supported.
>
> 3. To the legitimate inheritance.
>
> Section 187.—Illegitimate children may be recognized *in any way by the father and the mother conjointly*, or by either of them.

Section 189.—*A father is obliged to recognize his illegitimate child in the following cases:*

1. Where there be an authentic statement in writing made by him expressly recognizing its paternity.

2. When publicly or privately he has shown that it is his child, or has called it as such in conversation, or looks after its education and maintenance.

3. When the mother was known to have lived in concubinage with the father during the pregnancy or birth of the child, or when the child was born while his parents were engaged to be married (*relaciones amorosas*).

Section 190.—The father of the illegitimate child *shall support the mother and the child until the latter has arrived at the age of eighteen years*, including the expenses of education, and giving the child a profession or trade, in accordance with his social conditions. If after the age of eighteen years, the child cannot work, because of some physical or mental imperfection, his father shall continue to support him. *The support shall consist of a monthly pension in cash paid in advance.*

Section 191.—An illegitimate child has the right:

1. To bear the surname *of the person recognizing him.*

2. To be supported *by the same.*

3. To the inheritance determined in this Code.

Section 193.—Children born out of wedlock may be legitimatized by the subsequent marriage of their

parents, if under the law they may contract marriage, *or in the manner authorized in this Code.*

Section 194.—Children legitimatized by subsequent marriage, or as authorized in this Code, shall have the same rights and duties as legitimate children.

Section 196.—The illegitimate child recognized can also be legitimatized by a judicial declaration asked for by the father during his life time, or when stated in his will.

In this case the consent of the child shall be necessary, and if the child be under the age of eighteen years, that of the mother, unless the latter cannot give her consent on account of incapacity, absence or death.

When the father is married, the consent of his wife shall also be necessary.

Section 212.—Support is understood to be all that is indispensable for maintenance, housing, clothing and medical attention, according to the social position of the family.

Support also includes the education and instruction of the person supported when he is a minor.

Section 213.—The following are obliged to support each other, within the full meaning of the preceding article:

1. Husband and wife.

2. Legitimate ascendants and descendants.

3. *Parents and legitimatized children* and the descendants of the latter.

4. *Parents and illegitimate children*, and the legitimate descendants of the latter.

5. The adopter and the person adopted, excepting the provisions of Section 206.

Brothers and sisters also owe to their legitimate brothers and sisters, even when only on the mother's or father's side, the aid necessary to maintain their existence, when through a physical or mental defect or for any other cause not the fault of the person requiring support, the said person cannot provide for himself. With such support are included the expenses necessary for the elementary education and teaching of a profession or trade.

Section 216.—The amount paid for the support shall be in proportion to the resources of the person providing the same, and in accordance with the necessities of the party receiving it, and shall be reduced or increased in proportion to the resources of the former and the necessities of the latter.

Section 217.—The obligation to support may be claimed from the time the person having a right thereto shall require such support; *but it shall not begin until the date on which a petition therefor is made*.

Payments for support shall be made monthly, in advance, and when the person receiving the same dies, his heirs shall not be required to return any sum that may have been paid in advance.

Section 218.—The person obliged to render support may, if he so elects, either pay the amount required to be paid or receive and maintain in his own dwelling the person having a right to such support.

Section 221.—The preceding provisions are applicable to other cases in which by this Code, by will or by compact, a right to support may arise, excepting what is stipulated, ordered by the testator or provided by law for the special case under consideration." (Italics ours).

The Civil Code of Porto Rico adopted in 1902 differed in Title VII from the Spanish Code theretofore in force and from the Code as amended in 1911 in that it made no distinction between illegitimate children and natural children. An illegitimate child, who was a child born out of wedlock, could be recognized and legitimated in accordance with the provisions of the Civil Code of 1902. According to the Spanish Code and the Civil Code as amended in 1911, however, only natural children could be legitimated. Natural children are those "born out of wedlock, from parents who, at the moment when such children were conceived or were born could have intermarried with or without dispensation" (Section 193, Civil Code as amended in 1911). This Section 193 of the Civil Code as amended in 1911 is the same in effect and almost the same in words as Section 119 of the Spanish Civil Code (Translation of the Civil Code in force in Cuba, Porto Rico and the Philippines, October, 1899, Washington Printing Office).

From Section 180 of the Civil Code of 1902 quoted above it will be seen that natural or illegitimate children born between 1902 and 1911 could be legitimated either by the marriage of their parents "or in accordance with the provisions of this Code". The provisions of the Code are set forth in Section 187. They allow illegitimate children to be legitimatized "in any way by the father and the mother conjointly, or by either of them". By Section 189 of the Code of 1902 a father was obliged to recognize his illegitimate child "where there be an

authentic statement in writing made by him expressly recognizing its paternity".

Sections 187 and 189 of the Civil Code as it existed in 1906 have been combined in Section 193 of the Code as it has existed since the amendment of 1911, and in addition there has been included in Section 193 additional circumstances requiring a father to recognize a natural child. There has also been included in Section 193 the provision referred to in the original opinion of the Circuit Court of Appeals (R., 34) that

> "When the recognition of the minor is not made at the time of recording the birth or in the testament, the approval of the judge of the district court of the district where the child resides, with the concurrence of the fiscal, shall be necessary."

This last quoted provision, however, was not in the Code in 1906 or in the Code in 1910 at the time when, according to the complaint, plaintiff's mother and José Diaz executed a public instrument in which plaintiff's mother and Diaz acknowledged that they were the parents of the plaintiff.

Since 1910, therefore, because of the notarial acknowledgment, plaintiff has been the legitimatized child of José Dolores Diaz and under the law as it existed in 1906, in 1910, at the beginning of this action, and at the present time, he has the right to bear the surname of the person recognizing him, to wit, José Dolores Diaz. He has the right to be supported by Diaz and he has the right of inheritance from Diaz fixed by the Civil Code, which is in the case of a legitimatized child somewhat less than the share of a legitimate child. (Section 191, Civil Code, 1902, Revised Statutes and Codes of Porto Rico, 1902, p. 820; Section 195, Civil Code as amended in 1911, Laws of Porto Rico, 1911, p. 236; Laws of Porto Rico, 1905, amending Sections 795, 796

and 797 of the Civil Code, Revised Statutes and Codes of Porto Rico, 1911, pp. 687 ff.)

José Dolores Diaz, the acknowledging father, has certain rights of inheritance from his acknowledged son. José Dolores Diaz also has certain rights of support from the plaintiff.

If the plaintiff, José Garcia, is a natural child of any father he would have under the Code as amended in 1911 the same rights mentioned above. If, however, he were an illegitimate child of any father but lacked the legal qualifications of a natural child he would be entitled only to such support as is provided for by Section 213 of the Civil Code, and then only when paternity was established by a final judgment in a criminal or civil action or was shown by an indubitable document wherein filiation by the father was expressly recognized (Sections 196 and 197, Civil Code as amended in 1911; Revised Statutes and Codes of Porto Rico, 1911, p. 614).

The minor plaintiff after the execution of the notarial document of February 9, 1910, had a *status*. *This status has never been taken away from him*. It is alleged in the complaint that on April 13, 1925, the acknowledging parents revoked the legitimation of February 9, 1910, but that could not be done without the concurrence of the acknowledged child, and as he was a minor this concurrence could not be given. The minor plaintiff does not allege concurrence (R., 6).

Status in the civil law is an important fact. It is clear that the acknowledgment once having been made, whether as a result of fraud, conspiracy, intimidation or other cause, nothing but the judgment of a court is effective to change the status created. Certainly a revocation of the acknowledgment would not be effective.

In *Alcaide* v. *Morales*, 28 P. R. R. 258, a man who had acknowledged a natural child sued to annul the acknowledgment and the court laid down the rule that a person has the right to sue for the annulment of his acknowl-

edgment of a supposed natural child when the acknowledgment was the result of error, deceit, intimidation, force, or other similar cause, and the court also lays down the proposition that the evidence in such a case must be sufficiently strong to fully convince the court that an annulment of the acknowledgment is the only action demanded by justice. The Supreme Court at page 267 quoted from a decision of the Supreme Court of Spain of January 5, 1900 (89 Jurisprudencia Civil 26) to this effect:

> "The acknowledgment of a natural child by the putative parents, who marry before or after the acknowledgment, gives the child the condition and standing of a legitimate child for all lawful purposes attributed to this class of children, and, supposing such an acknowledgment, *there is nothing in our ancient or modern laws authorizing any arbitrary modification of such an acknowledgment in prejudice of the child's interest.*" (Italics ours.)

The Supreme Court, at page 270 also quotes from Escriche as follows:

> "Being free to acknowledge or not his natural child, the father, although he may be a minor, can not revoke an acknowledgment already lawfully made by him. Such an acknowledgment is not a liberality so to speak, but the statement of a fact to which the law attaches certain advantages and after this declaration of paternity is made the child acquires a status of filiation of which it cannot be deprived.
>
> * * * * *
>
> Every acknowledgment by a father or mother, and even every claim of the child, may be controverted by such persons as may have an interest in it. The child, as the first in interest, may attack its acknowledgment by a man or woman whom he

considers as strangers, proving that neither the former could be his father, nor the latter his mother. The mother may also attack an acknowledgment made by an alleged father, because it can not be left to the caprice of any unscrupulous man to cause himself to be considered as the father of the child of an opulent widow or unmarried woman who may have disgraced herself. The father may likewise repudiate the acknowledgement which, though rarely, an alleged mother may make with speculative intent. In short, every acknowledgment untruthfully made may be attacked by any person prejudiced thereby."

In *Garcia* v. *Garcia*, 18 P. R. R. 926, the Supreme Court of Porto Rico held that a suit could be brought by a minor through his guardian to set aside a notarial acknowledgment of paternity by one alleged not to be the father.

We think it clear that the acknowledgment by Diaz in 1910 is binding upon the world until set aside by a judgment of a competent court having jurisdiction over all the parties concerned. The court could not proceed without the child, the mother, and the acknowledging father, because each of the three have reciprocal rights, one against the other. The one unnecessary party in such an action would be the petitioner here.

The Circuit Court of Appeals, however, has held that the fraud alleged in the complaint is sufficient to cut down and destroy the legitimation affected by the notarial instrument of February 9, 1910, and it was held that the public document whereby José Garcia was legitimated had no greater legal significance or validity than the public document of 1925 repudiating the former act of recognition (R., 34). This is clearly erroneous and should be corrected by this court before the expense of a trial and a further appeal is put upon the parties.

D.

An illegitimate child cannot by operation of law have two fathers.

The Circuit Court of Appeals wholly disregards the decisions of the Supreme Court of Porto Rico in *Alcaide* v. *Morales* and *Garcia* v. *Garcia*, *supra*, holding that an acknowledgment once made can only be set aside by the judgment of a court before which all the interested parties are present. It directs the District Court to proceed in the case at bar as if the recognition of the plaintiff by Diaz made in 1910, in accordance with Section 187 of the Civil Code then in force, had never been made.

If the plaintiff should succeed in the court below he will of necessity be held to be the illegitimate son of petitioner. That is the basis of his claim. He has, therefore, established his paternity as the child of petitioner in an action and petitioner is required to recognize him. It makes no difference that counsel for the minor plaintiff claims that the action is not for filiation. It makes no difference that the Circuit Court of Appeals has held that the case is not for filiation (R., 32). Filiation directly follows an adjudication in this action that petitioner is the father of plaintiff.

In *Armsterdam* v. *Puente*, 16 P. R. R. 527, at 533, the court said:

> "We think it is a fair deduction from the provisions of the Civil Code, heretofore in existence, as well as the practice and jurisprudence in this regard that, without some authentic act which reveals the will of the father to give the child a status, the child has only a right of action to compel the father to confer such status. Section 135 of the

Spanish Civil Code and Section 189 of the Porto Rican Civil Code provide for the cases when a father is compelled to acknowledge his illegitimate child. He can be compelled by an action, and the necessity for such action can only be said to be dispensed with when there are some solemn acts on the part of the father, which show that this obligation has already been performed."

What results from such an adjudication of paternity?

1. Plaintiff is entitled to support from petitioner (Section 213, Civil Code, Revised Statutes and Codes of Porto Rico, 1911, p. 615).

2. Plaintiff becomes a forced heir of petitioner and cannot be deprived of his inheritance (Sections 795, 796, 797, Civil Code, Revised Statutes and Codes of Porto Rico, 1911, p. 687 ff.).

3. Petitioner is entitled to support from plaintiff (Section 213, Civil Code, *supra*).

4. Petitioner is entitled, if plaintiff should die without leaving a recognized or legitimatized posterity, to the entire estate of plaintiff (Section 913, Civil Code as amended, Revised Statutes and Codes of Porto Rico, 1911, p. 700).

An adjudication in the case at bar that petitioner is plaintiff's father does not in the slightest degree affect plaintiff's status as the legitimated son of José Dolores Diaz y Aponte. He merely becomes by operation of law the son of two fathers. By reason of the decisions of the Supreme Court of Porto Rico in *Alcaide* v. *Morales* and *Garcia* v. *Garcia*, *supra*, he does not cease to be the acknowledged son of Diaz.

What are his rights and obligations in respect to his father Diaz?

1. Plaintiff is entitled to support from Diaz.

2. Plaintiff becomes a forced heir of Diaz and cannot be deprived of his inheritance.

3. Diaz is entitled to support from plaintiff.

4. Diaz is entitled, if plaintiff should die without leaving a recognized or legitimatized posterity, to one-half of his estate, the other half going to his mother, if alive; if not, the entire estate going to Diaz (Section 913, Civil Code, *supra*).

The decision of the Circuit Court of Appeals produces this travesty upon natural law and justice. Its decision is in conflict with its own well settled rule and the rule of this court that decisions of the Supreme Court of Porto Rico upon matters of local law are not to be disturbed except in cases of very plain error.

> *Hartman & Co.* v. *Sanchez*, 12 Fed. (2nd) 649;
> *Cami* v. *Central Victoria, Ltd.*, 268 U. S. 469.

In the latter case the Circuit Court of Appeals for the First Circuit reversed the Supreme Court of Porto Rico on a question of local law. This court granted certiorari. Mr. Justice Holmes said at page 470:

> "Had the Circuit Court of Appeals deferred to the local interpretation of Porto Rican statutes, we should not have granted a writ. We repeatedly have stated the reason for such deference, and we believe that the appellate jurisdiction was granted with other ends in view than that of setting the local courts right in their interpretation of their own laws."

All the absurd possibilities created by the decision of the Circuit Court of Appeals would be avoided if the plaintiff were first required, as orderly procedure dictates, and as the Supreme Court of Porto Rico holds, to sue José Dolores Diaz y Aponte and his mother, Jacinta Garcia y Torrendell, to set aside the acknowledgment of 1910. If he succeeded in this he might then proceed in the manner authorized by law against the petitioner.

E.

Jacinta Garcia y Torrendell has no legal capacity to institute this action.

The action is brought by the plaintiff's mother in his behalf evidently upon the theory that she is his natural guardian and has *patria potestas* over him.

Section 56 of the Code of Civil Procedure (Revised Statutes and Codes of Porto Rico, 1911, p. 820) provides that an infant if a party must appear "either by his general guardian or by a guardian *ad litem* appointed by the court in which the action is pending, in each case, or by a judge thereof".

Obviously no guardian *ad litem* has been appointed.

Section 222 of the Civil Code of Porto Rico (Revised Statutes and Codes of Porto Rico, 1911, p. 617) is as follows:

> "The *patria potestas* over the legitimate children not emancipated belongs in the first place to the father, and in case of his absence, legal incapacity or death, to the mother.
>
> Illegitimate children and adopted minors shall be under the *potestas* of the father or mother acknowledging or adopting them. Where they have been acknowledged or adopted by both parents, the provision of paragraph one of this section shall be applicable."

José Dolores Diaz y Aponte, who joined with the mother in legitimating him, is the natural guardian of of the plaintiff and he only could bring this action upon the plaintiff's behalf.

F.

Jose Dolores Diaz is a necessary party.

José Dolores Diaz is shown to have legally acknowledged the plaintiff in the manner prescribed by the laws of Porto Rico. This acknowledgment of paternity by a public instrument cannot be made and un-made at the whim of the parties. When José Dolores Diaz executed the document of February 9, 1910, he became liable under the law, whether the document be treated as a document of recognition or as a document of adoption for the support of the plaintiff. (Sec. 213 Civil Code, Revised Statutes and Codes of Porto Rico, 1911, p. 615.) In passing upon the questions raised in the complaint the court must of necessity adjudicate the obligations of José Dolores Diaz and his status as plaintiff's father either by recognition of paternity or by adoption.

The court cannot adjudicate as to José Dolores Diaz without his presence before the court.

Conclusion.

It is respectfully submitted that the writ of certiorari prayed for should be granted, the cause reviewed, and the judgment of the Circuit Court of Appeals for the First Circuit reversed.

Dated, November 2, 1927.

FRANCIS E. NEAGLE,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES.

No. 725.—October Term, 1926.

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Fairmont Creamery Company, Plaintiff in Error,
vs.
State of Minnesota, Defendant in Error.
} Motion to retax costs.

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[November 21, 1927.]

Mr. Chief Justice Taft delivered the opinion of the Court.

This is a motion by the State of Minnesota to retax the costs in this Court which by the judgment herein have been awarded against it. The Fairmont Creamery Company was charged with an offense under a statute of Minnesota before a justice of the peace, and was convicted. The judgment was affirmed on appeal to the District Court for the county, and this was in turn affirmed by the Supreme Court of the State. 168 Minn. 378, 381. The Creamery Company then sued out a writ of error from this Court, which on April 11, 1927, reversed the judgment, because of the unconstitutionality of the statute under which the conviction had been had. 274 U. S. 1. The following was the judgment:

". . . On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this Court."

No application for rehearing was made during the term which ended on June 6, 1927. The mandate was issued, and filed with the Supreme Court of Minnesota in July, 1927. The motion of defendant in error now before us was filed September 30, 1927.

Our Rule 30, effective July 1, 1925, provided that a petition for rehearing may be filed with the Clerk, in term time or in vacation, within forty days after judgment is entered, but not later. It is contended by the plaintiff in error that the motion to retax costs

would amend the judgment after the term and must be denied, for the reason that this Court has no further jurisdiction in the matter. *Peck* v. *Sanderson*, 18 How. 42; *Sibbald* v. *United States*, 12 Pet. 488, 491, 492; *Schell* v. *Dodge*, 107 U. S. 629, 630; *Phillips* v. *Negley*, 117 U. S. 665, 674. In answer, it is said that this limitation upon the power of the court does not include mere misprisions of the clerk or clerical errors. *Bank of Kentucky* v. *Wistar*, 3 Pet. 431; *Bank of United States* v. *Moss*, 6 How. 31, 38. In the former case, the failure to include as damages in a judgment 6 per cent. interest when required by a rule of the Court was held to be a clerical error that could be corrected after the term. So it is said that the inclusion of the costs in this case was a mere misprision of the clerk, because merely added by the clerk without any special order of the Court. This is inferred because no reference to costs appears in the published opinion. It is not the proper inference. The provision as to costs appears in the judgment, the form of which was, in accordance with our practice, approved by the Justice who wrote the opinion. He acted under authority of section 3, Rule 29, providing: "In cases of reversal of any judgment or decree by this court, costs shall be allowed to the plaintiff in error, appellant or petitioner, unless otherwise ordered by the court."

A clause in a final judgment affecting costs has been held to be substantial and not within the court's power to change after the term. *Jourolmon* v. *East Tennessee Land Co.*, 85 Fed. 251; *Staude Manufacturing Co.* v. *Labombarde*, 247 Fed. 879. The distinction between cases, in which provisions as to interest or costs may be changed after the term and those in which they can not be, lies in the nature and source of the alleged error. If it is made by the clerk in following or not following a rule of court, or for some other reason, the error may be remedied, but if the action complained of was approved by the court, it is beyond recall. Here the judgment as to costs was the action of the Court. See *St. Louis and San Francisco R. R. Co.* v. *Spiller*, No. 577, October Term, 1926, opinion announced today.

But we are not content to dispose of the motion on this ground alone, even though it be adequate, for the main question is one of much importance in the every day practice before us and ought

to be decided now. The argument for the state is that this is a criminal case; that costs in criminal proceedings are only a creature of statute, and that this court has no power to award them against a state unless legislation of the state has conferred it. This is the rule as to the state court in Minnesota. *State* v. *Buckman*, 95 Minn. 272, 278. At common law the public pays no costs, in England the King does not, and the state here, it is said, stands in the place of the King. So it is insisted that, when the state is brought into this Court as a defendant in error in a criminal proceeding, and the judgment of the Court goes against it, costs can not be awarded against the state because it is a sovereign.

That the sovereign is not to be taxed with costs in either civil or criminal cases by rule of court without a statute is undoubtedly true. Chief Justice Marshall, in the case of *United States* v. *Barker*, 2 Wheat. 395, said: "The United States never pay costs." In *Reeside* v. *Walker*, 11 How. 272, at p. 290, this Court said: "The sovereignty of the government not only protects it against suits directly, but against judgments even for cost, when it fails in prosecutions." *The Antelope*, 12 Wheat. 546, 550; *United States* v. *McLemore*, 4 How. 286, 288; *United States* v. *Boyd*, 5 How. 29, 51. See also *Nabb* v. *United States*, 1 Ct. Cl. 173; *Henry* v. *United States*, 15 Ct. Cl. 162. But is the state to be regarded as the sovereign here? This Court is not a court created by the State of Minnesota. The case is brought by a writ of error issued under the authority of the United States by virtue of the Constitution of the United States. It is not here by the state's consent but by virtue of a law, to which it is subject. Though a sovereign, in many respects, the state when a party to litigation in this Court loses some of its character as such.

For many years, costs have been awarded by this Court against states. Under the judicial article of the Constitution, the original jurisdiction of this Court includes suits to which a state is a party. There have been many boundary and other cases brought here by one state against another in which costs have been awarded against one of them and often against both. Usually they have been divided, but if the case proves to be a "litigious case", so-called, all the costs have been assessed against the defeated party. *State of North Dakota* v. *State of Minnesota*, 263 U. S. 583. *State of Missouri* v. *State of Iowa*, 7 How. 660, 681, shows that this has been

the practice since 1849. A rule of this Court as to the awarding and division of costs is, of course, not a statute, but such a rule seems to us to be within the inherent authority of the Court in the orderly administration of justice as between all parties litigant, properly within its jurisdiction, except the sovereign government. This view is supported by the history of Rule No. 37 of this Court in the January Term of 1831, 5 Pet. 724. That shows that, against the dissent of Mr. Justice Baldwin, this Court adopted a rule imposing costs against a defendant for a transcript of record in cases of reversal. The dissent was based on the ground that no costs could be imposed by this Court by rule without specific authority of a statute.

It is insisted that, while in civil cases costs may be awarded against a state as a litigant before this Court, the rule does not apply in criminal cases. As the objection to taxing costs against a state has been because of its sovereign character, and that, as we have said, has no application to a state as a litigant in this Court, there would seem to be no more reason for immunity in a criminal case than in a civil one. But it is pointed out that this distinction has been made by this Court in the case of *United States ex rel. Phillips* v. *Gaines*, 131 U. S., Appendix, clxix. That was a writ of error from this Court on a certificate of division between the Judges of the United States Circuit Court for the Middle District of Tennessee. It was a mandamus case brought to command the comptroller of the state to issue his warrant to the state treasurer for the payment of a bill of costs of an indictment against Phillips, one of the relators. In 1870, Phillips had been indicted in the county of Putnam for the murder of one Ford. Phillips presented his petition to the state court, praying for the removal of the indictment into the Circuit Court of the United States by virtue of three Acts of Congress, the first, of March 3, 1863, c. 81, 12 Stat. 755, 756, § 5, the second, of May 11, 1866, c. 80, 14 Stat. 46, § 3, and the last, of February 5, 1867, c. 27, 14 Stat. 385. Their purpose was to enable any officer of the United States, military or civil, charged with a crime, against the state, for acts done under color of federal authority, to remove the prosecution into the Circuit Court of the United States for trial by the state prosecuting officers in that court. In 1874, the State of Tennessee, by her attorney, appeared and dismissed the case, agree-

ing that the costs should be adjudged against the state. The Circuit Court accordingly rendered the judgment for costs. A warrant for the payment of the costs was demanded from the state comptroller and refused. Mr. Justice Strong, in deciding the case, said:

"Costs in criminal proceedings are a creature of statute, and a court has no power to award them unless some statute has conferred it."

He pointed out that this was the rule in the State of Tennessee, *Mooneys* v. *State*, 2 Yerger, (Tenn.) 578, but referred to an Act of 1813 of that State in which it was provided that in all criminal cases above the grade of petit larceny, where the defendant was acquitted, costs should be paid out of the treasury of the State. There were certain statutory prerequisites before they could be paid by the comptroller. The judgment of this Court turned on the fact that such prerequisites had not been complied with. The language of the court indicated that costs could only be awarded in accordance with the statute of the State of Tennessee. We do not think that the case on its facts is an authority here. There was a peculiar and exceptional situation. The case was a prosecution by the State of Tennessee, and its trial by the state was bodily transferred to the environment of the Circuit Court of the United States. All incidents of a trial of the case in the state court were regarded as following the case in the federal court. The question of costs was, therefore, thought to be governed by the same rule as it would have been in the state court.

Without reconsidering the correctness of that ruling, we think the case here to be different. The costs here incurred are in a litigation brought by writ of error into this Court to test the validity under the Federal Constitution of a statute of the state. The incidents of the hearing are those which attach to the regular jurisdiction of this Court. We have had our Clerk make an examination of our records reaching back to 1860. There were one hundred twenty-nine cases examined, which do not include the boundary cases between states on the Original docket already referred to. It thus appears that since that date the invariable practice has been when the judgment has been against a state in both civil and criminal cases to adjudge costs against it, under the Rule which is now section 3, Rule 29, of our present Rules. That rule in dif-

the practice since 1849. A rule of this Court as to the awarding and division of costs is, of course, not a statute, but such a rule seems to us to be within the inherent authority of the Court in the orderly administration of justice as between all parties litigant, properly within its jurisdiction, except the sovereign government. This view is supported by the history of Rule No. 37 of this Court in the January Term of 1831, 5 Pet. 724. That shows that, against the dissent of Mr. Justice Baldwin, this Court adopted a rule imposing costs against a defendant for a transcript of record in cases of reversal. The dissent was based on the ground that no costs could be imposed by this Court by rule without specific authority of a statute.

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ferent forms, and under a different number, has been in force since the February term, 1810. Dewhurst, Rules of Practice in the U. S. Courts (2d ed.) 153. It has been in its present form since the January Term, 1858. See *St. Louis and San Francisco R. R. Co.* v. *Spiller, supra,* opinion announced this day. We think that the rule construed by long practice justifies us in treating the state just as any other litigant and in imposing costs upon it as such, without regard to the inferences sought to be drawn from *United States ex rel. Phillips* v. *Gaines, supra.*

If specific statutory authority is needed, it is found in section 254 of the Judicial Code, which first appeared in the Act of March 3, 1877, c. 105, 19 Stat. 344, and was re-enacted March 3, 1911, c. 231, 36 Stat. 1087, 1160. It provides that there shall be "taxed against the losing party in each and every cause pending in the Supreme Court" the cost of printing the record, except when the judgment is against the United States. This exception of the United States in the section with its emphatic inclusion of every other litigant shows that a state as litigant must pay the costs of printing, if it loses, in every case, civil or criminal. These costs constitute a large part of all the costs. The section certainly constitutes *pro tanto* statutory authority to impose costs generally against a state if defeated.

The motion is denied.

A true copy.

Test:

Clerk, Supreme Court, U. S.